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MICHAEL RODAK,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-801

MELVIN T. SMITH, *Petitioner*

v.

FERRON C. LOSEE, ANDREW H. BARNUM, DALE PETERSON, LEGRAND P. BACKMAN, SHELDON S. ALLRED, EDNA H. BAKER, DEXTER C. SNOW, A. REED MORRILL, N. RUSSELL TANNER, HELEN B. URE, GYLE E. RIDDLE, AND LYNN S. RICHARDS, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JERRY D. ANKER
LICHTMAN, ABELES & ANKER, P.C.
1730 M Street, N.W.
Washington, D. C. 20036

BRYCE E. ROE
340 East Fourth South
Salt Lake City, Utah 84111

Attorneys for Petitioner

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this case on August 22, 1973.

OPINIONS BELOW

The *en banc* opinion of the Court of Appeals is not yet officially reported. It is reproduced in the appendix to this petition at page 1a. The opinion of Judge

Barrett, concurring in part and dissenting in part, is at page 20a, and the opinion of Judge Doyle, who dissented, is at page 32a.

The findings of fact and conclusions of law entered by Chief Judge Willis W. Ritter of the United States District Court for the District of Utah, which have not been reported, are reproduced in the appendix at page 37a. The judgment of the District Court is at page 44a.

JURISDICTION

The judgment of the Court of Appeals was entered on August 22, 1973. This Court has jurisdiction to review that judgment by writ of certiorari under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the members of a State Board of Education who, acting upon the recommendation of the president of a state college, terminated the employment of an associate professor at the college in retaliation for his political and other free-speech activities, and who failed to give the professor a hearing to which he was entitled under the due process clause of the Fourteenth Amendment, are protected from personal liability under 42 U.S.C. § 1983 by the doctrine of "official immunity."

2. Whether a college professor whose employment at a state college is terminated in violation of his rights under the First and Fourteenth Amendments is entitled, in an action under 42 U.S.C. § 1983, to recover not only his lost salary and other out-of-pocket losses, but also compensation for the humiliation, injury to reputation, and disruption of career plans which he suffered as a result of the termination.

STATUTE INVOLVED

Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. § 1983, provides as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress."

STATEMENT OF THE CASE

Petitioner Melvin T. Smith was employed from 1965 to 1969, under four successive one-year contracts, as associate professor of history at Dixie Junior College, a state institution located in St. George, Utah. The District Court found that he was a "skilled and professional teacher who participated actively in college and community affairs" (41a). The Court of Appeals agreed: "He appears to have been very well qualified for his teaching duties at the college. No issue is raised as to the performance of his classroom duties or as to his scholarship."(2a). Nevertheless, in 1968, at the end of his third year at the college, petitioner was denied tenure—despite favorable recommendations from the head of his department and from the Faculty Personnel Committee. In 1969, he was again denied tenure, and this time he was also denied renewal of his employment.

Petitioner then filed suit under 42 U.S.C. § 1983 in the United States District Court for the District of Utah, alleging in substance (1) that the denials of

tenure and termination of employment were in retaliation for activities which were protected by the First Amendment, and (2) that he had not been given a hearing to which he was entitled under the due process clause of the Fourteenth Amendment. The complaint named as defendants the president and two deans of the college who had recommended the denials of tenure and the termination, and the members of the Utah State Board of Education, who had made the ultimate decisions. All of the defendants were sued in their individual capacities. The complaint sought both compensatory and punitive damages.

The Findings of the District Court

The case was tried before Chief Judge Willis W. Ritter, sitting without a jury, who found for petitioner on all issues. With respect to the First Amendment claim, the court found that the college administrators had recommended against granting petitioner tenure or renewing his employment contract "for the purpose of punishing him for having supported a particular candidate in a state political election, for having opposed the college administration in his capacity as president and member of the executive committee of the faculty association, and for having expressed opposition to some administration policies during meetings of the Dixie College Faculty Association." (41a). The court further found that the members of the State Board of Education had "made no substantial inquiry into the reasons behind" the adverse recommendations of the college administrators, but had accepted their recommendations "solely on the ground that it was their duty to support the president of the college." (41a)

With respect to the due process claim, the court found that the actions complained of "were taken without plaintiff having been given notice and opportunity to be heard"(42a) despite the fact that the "Dixie College Policy on Faculty Tenure and Promotions" expressly provided that an associate professor would be terminated only for certain specified causes, and "would be entitled to a fair and impartial hearing before the governing board with an opportunity to provide legal counsel for himself."(38a)

On the issue of damages, the court found that plaintiff has "suffered special damages in the amount of $4,100 by way of loss in salary and attempts to mitigate his damages." (43a) In addition, the court found that, as a result of the termination, petitioner became "a dangerous subject on the Dixie campus," and his "reputation among students and his former colleagues at Dixie Junior College and other colleges" was "seriously damage[d]." Although he had formerly been "highly regarded by and popular with students and faculty alike," and "had been elected president of the faculty association, and later elected a member of the personnel committee," after the termination he was "shunned by his former faculty members." Moreover, "[b]ecause of defendants' actions, plaintiff found it impossible to obtain another position as a history teacher for which he had spent years of preparation," and thus was "effectively denied the right to pursue that profession." (41a-42a) The court also found:

> "At about the time in 1969 when plaintiff was denied permanent status and further employment at Dixie Junior College, defendants Barnum and Losee made statements to faculty members and

> to students that action had been taken against plaintiff because of misconduct of a serious nature; and that in order to protect plaintiff the details would not be made known. The statements by said defendants, and the circumstances under which they were made, created strong innuendos and inferences, which were untrue and of a highly defamatory character, that plaintiff was guilty of immoral or illegal conduct. The actions of defendants Losee and Barnum in making the statements were willful and malicious." (40a-41a)

On the basis of these findings, the court awarded petitioner $4,100 in special damages and $40,000 in general damages against all defendants, and $2,500 each in punitive damages against defendants Losee and Barnum. All defendants appealed.

The Decision of the Court of Appeals

The case was initially argued before a panel of the Court of Appeals, but that panel did not issue a decision. Instead, the court subsequently scheduled the case for reargument before the full court sitting *en banc*. On August 22, 1973, the court rendered its decision.

The Court of Appeals had no difficulty concluding that "[t]here is certainly substantial evidence in the record to sustain the finding that Smith was refused tenure and reemployment as a reprisal for the exercise of his constitutionally protected First Amendment rights. . . ."(9a) It also specifically sustained the District Court's finding that "[t]here were no justifiable grounds for denying plaintiff permanent status on the faculty of Dixie Junior College or for denying him employment at the college after the end of the

1968-1969 academic year." (10a) On the basis of these findings, the court concluded that "Smith has established his claim under 42 U.S.C. § 1983." (11a)[1]

Nevertheless, the court reversed the judgment which had been entered against the members of the State Board of Education, on the ground that they were protected by the doctrine of "official immunity." Although the court recognized that "there is a collision between the doctrine of official privilege and section 1983 of the Civil Rights Act" (13a), it nevertheless concluded that "[t]he doctrine has not been eliminated nor significantly changed in its application to suits brought under the Civil Rights § 1983." (13a) While the court conceded that the members of the Board of Education were not entitled to absolute immunity, it held that they had a "qualified privilege" which "may be established, and was here so done, by an affirmative showing that the decision not to renew or to discharge was board action representing an exercise of its discretion vested in it by state law, made in good faith, and without malice, when the official facts before them showed a good and valid reason for the decision although another reason or reasons advanced for nonrenewal or discharge may have been constitutionally impermissible." (18a)[2]

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[1] The court apparently took the view that since it had sustained petitioner's First Amendment claim, it did not have to consider his separate procedural due process claim. Thus, although the court's opinion states that one of the "three main issues raised on appeal" is whether petitioner was denied procedural due process (6a-7a), it did not discuss that issue at all.

[2] The court did not explain what "official facts" before the Board "showed a good and valid reason for the decision;" nor did the court attempt to reconcile that statement with the earlier portion of its opinion sustaining the findings that petitioner had

As to the other defendants—namely, the president and deans of the college—the court concluded that the "official immunity" doctrine was not applicable. It noted that "the trial court found actual malice to support punitive damages to have existed in defendants Losee and Barnum," and that this finding was "supported by the record." (19a). Accordingly, the court said, "under anything short of absolute privilege, recovery would be possible" against these defendants, and "[t]hey, of course, had no such absolute privilege." (19a) As for the other college dean, Dale Peterson, the court held that the finding that "his actions (together with those of defendants Losee and Barnum) were taken for the purpose of punishing the plaintiff for having supported a particular candidate in a state political election, and for other reasons related to his First Amendment rights," was sufficient to overcome any claim of privilege. (19a)

The court, however, substantially reduced the amount of damages which petitioner could recover even against these defendants. While it affirmed the award of $4,100 "special damages" and $5,000 punitive damages, it set aside the $40,000 in "general damages" which the District Court had awarded. The court explained its action as follows:

> "As to proof of damages, the record contains no evidence to support an award of general damages. As to this matter, plaintiff testified that he attempted to find a teaching position at other schools but was unable to do so. He did find another position with the state at a comparable or

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been terminated because of his free-speech activities and that "[t]here were no justifiable grounds for denying plaintiff permanent status . . . or for denying him employment at the college . . ."(9a-10a).

better salary. He is entitled to no damages just by reason of a change of jobs.

"There was no showing as to any effect resulting from the inability to find a teaching position. There was evidence that he was, in the words of the trial court, harassed by defendants Losee and Barnum. However, there is no pendent cause for defamation or any related cause. Many, if not all, of the incidents complained of appear to have taken place after the discharge was announced, although under the record it is difficult to determie just when the actual termination was effective. We must hold that the award of general damages was without adequate basis in the facts, and must be set aside." (19a)

Two judges filed dissenting opinions. Judge Barrett argued that the judgment of the District Court should have been reversed *in toto*. He expressed the view that state officials should be "immune from Civil Rights damage judgments unless they perform their *discretionary* functions relative to teacher employment, assignment, tenure and contract renewal with *malice*." (24a-25a; emphasis in original.) Although recognizing that malice had been found in this case, he argued that this finding was "clearly erroneous." In his view, the college administrators were entitled to take account of such matters as petitioner's political activities, and his opposition to or criticism of administration actions and policies, in determining whether he should be retained on the faculty. (29a-31a)

The other dissenter was Judge Doyle. His view was that all of the defendants, including the members of the Board of Education, should have been held liable. Although he was willing to recognize official immunity for acts which represented "a good faith exercise of

discretion" (33a), he argued that "the board members are subject to liability in this case becaus they did not investigate the facts. They merely adopted and affirmed the President's conclusion. . . ." (34a) He also stated:

> "If the Civil Rights Act is to be given a grudging and parsimonious application by the expedient of expanding the immunity, it means that the Supreme Court's decisions in cases like Perry v. Sindermann, 408 U.S. 593 (1972) and Pickering v. Board of Education, 391 U.S. 563 (1968) and the cases there cited mean very little. It does not seem likely that the Supreme Court would have gone to the trouble of recognizing civil rights violations in these circumstances if it had contemplated that the Act could be limited at will by expanding the immunity of the officers involved." (34a)

Judge Doyle also disagreed with the majority's decision to set aside the award of "general damages." He argued that petitioner "is certainly entitled to some award for humiliation or . . . injury to his reputation, or both." (35a). He did, however, consider the amount awarded by the District Court to be "excessive," and therefore would have reduced the general damages from $40,000 to $10,000. (35a-36a).

REASONS FOR GRANTING THE WRIT

I

In the explosion of litigation which has occurred in recent years under 42 U.S.C. § 1983, a recurring and troublesome question has been whether, or to what extent, state officials sued under that statute are protected from personal liability by the doctrine of "of-

ficial immunity.'"[3] This has been described as "[o]ne of the most perplexing problems raised by the multitude of recent cases arising under the Civil Rights Acts." Note, *The Doctrine of Official Immunity Under the Civil Rights Acts,* 68 Harv. L. Rev. 1229 (1955). The question is of obvious importance, because the effectiveness of Section 1983 as an instrument for the vindication of constitutional rights will depend largely upon how it is ultimately resolved. It is also a question which has caused considerable confusion and conflict among the lower federal courts. And it is a question which is already pending before this Court in two cases involving damage suits against the Governor of Ohio and other state officials for deaths caused by National Guard troops during the Kent State disturbance. *Scheuer* v. *Rhodes, No.* 72-914, and *Krause* v. *Rhodes,* No. 72-1318 (certiorari granted June 26, 1973). The present case would give the Court an opportunity to consider the immunity issue on a full trial record, and in a different context which occurs more commonly under Section 1983.[4]

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[3] For a detailed historical analysis of the doctrines of official immunity and sovereign immunity, see Engdahl, *Immunity and Accountability for Positive Government Wrongs,* 44 Colo. L. Rev. 1 (1972). See also Jaffe, *Suits Against Governments and Officers: Damage Actions,* 77 Harv. L. Rev. 209 (1963); Hart & Wechsler, *The Federal Courts and the Federal System,* 1410-23 (2d ed. 1973).

[4] Suits by public employees alleging that they have been deprived of their jobs for constitutionally impermissible reasons, or in a manner which violated their right to procedural due process, have been one of the most common kinds of actions brought under Section 1983. See, e.g., *Pickering* v. *Board of Education,* 391 U.S. 563 (1968); *Perry* v. *Sindermann,* 408 U.S. 593 (1972); *Board of Regents* v. *Roth,* 408 U.S. 564 (1972); *American Federation* of *State, County and Municipal Employees v. Woodward,* 406 F.2d 137 (8th Cir. 1969); *Cooley* v. *Board of Education,* 453 F.2d 282 (8th Cir. 1972); *Ferguson* v. *Thomas,* 430 F.2d 852 (5th Cir. 1970);

In *Tenney* v. *Brandhove*, 341 U.S. 367 (1951), and *Pierson* v. *Ray*, 386 U.S. 547 (1967), this Court held that the absolute immunity traditionally granted by the common law to legislators and judges for actions taken in the performance of their official duties was not affected by Section 1983. The Court has also held that municipalities are not subject to suit under that statute. *Monroe* v. *Pape*, 365 U.S. 167 (1961); *City of Kenosha* v. *Bruno*, 93 S.Ct. 2222 (1973). But the question of whether state executive or administrative officials can claim immunity from personal liability for actions which violate fundamental constitutional rights still remains to be resolved.

The decisions of the lower federal courts reflect at least three different views of the matter. At one extreme is *Krause* v. *Rhodes*, 471 F.2d 430 (6th Cir. 1972), *cert. granted*, 93 S.Ct. 3065 (1973), in which the court seemed to hold that executive officials exercising discretionary functions have the same absolute immunity from personal liability as do judges and legis-

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Fisher v. *Snyder*, 476 F.2d 375 (8th Cir. 1973); *Fluker* v. *Alabama State Board of Education*, 441 F.2d 201 (5th Cir. 1971); *Gieringer* v. *Center School Dist No.* 58, 477 F.2d 1164 (8th Cir. 1973), *cert. denied*, 42 U.S.L. Week 3195 (1973); *Hostrop* v. *Board of Junior College Dist. No. 515*, 471 F.2d 488 (7th Cir. 1972), *cert. denied*, 411 U.S. 967 (1973); *James* v. *Board of Education*, 461 F.2d 566 (2d Cir. 1972), *cert denied*, 409 U.S. 1042 (1972); *Johnson* v. *Branch*, 364 F.2d 177 (4th Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967); *Keefe* v. *Geanakos*, 418 F.2d 359 (1st Cir. 1969); *Langford* v. *City of Texarkana*, 478 F.2d 262 (8th Cir. 1973); *Lucas* v. *Chapman*, 430 F.2d 945 (5th Cir. 1970); *McEnteggart* v. *Caltaldo*, 451 F.2d 1109 (1st Cir. 1971); *McLaughlin* v. *Tilendis*, 398 F.2d 287 (7th Cir. 1968); *Pred* v. *Board of Public Instruction*, 415 F.2d 851 (5th Cir. 1969); *Puentes* v. *Board of Education*, 24 N.Y. 2d 996, 250 N.E. 2d 232 (1969); *Russo* v. *Central School District No.* 1, 469 F.2d 623 (2d Cir. 1972) *cert denied*, 411 U.S. 932 (1973); *Simard* v. *Board of Education*, 473 F.2d 988 (2d Cir. 1973); *Wilderman* v. *Nelson*, 467 F.2d 1173 (8th Cir. 1972).

lators. The opposite view is reflected in several decisions of the Second Circuit, which appear to hold that executive or administrative officials can claim no immunity for actions which violate constitutional rights. See *Jobson* v. *Henne,* 355 F.2d 129, 133-34 (2d Cir. 1966); *Birnbaum* v. *Trussell,* 347 F.2d 86, 88-89 (2d Cir. 1965); *Sostre* v. *McGinnis,* 442 F.2d 178, 205 n. 51 (2d Cir. 1971). A third view, which is reflected in the decision in the present case, is that state officials are immune from liability for actions taken in "good faith."[5] See also *Francis* v. *Lyman,* 216 F.2d 583 (1st Cir. 1954); *McLaughlin* v. *Tilendis,* 398 F.2d 287, 290-91 (7th Cir. 1968); *Westbury* v. *Fisher,* 309 F. Supp. 12, 15-18 (D. Me. 1970). The meaning of this "good faith" standard is, moreover, itself a source of considerable confusion and conflict. The three opinions in the present case, for example, all purported to apply a "good faith" test, and yet they reached three different results.

In view of the importance of the issue presented, the apparent inability of the lower courts to reach a consensus on the matter, and the fact that similar questions are already pending before the Court in

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[5] The decision of this Court in *Pierson* v. *Ray,* 386 U.S. 547 (1967), is sometimes cited for the proposition that "good faith" is a defense to an action under § 1983. That case, however, merely held that "the defense of good faith *and probable cause,*" which is available to police officers in a "common-law action for false arrest and imprisonment, is also available to them in the action under § 1983." *Id.* at 557 (emphasis added). The case certainly did not suggest that "good faith" would be a defense in the absence of "probable cause." See *Whirl* v. *Kern,* 407 F.2d 781 (5th Cir. 1969), *cert. denied,* 396 U.S. 901 (1969); *Joseph* v. *Rowlen,* 402 F.2d 367 (7th Cir. 1968). Nor did it deal with the question of whether, or to what extent, "good faith" might constitute a defense in cases not involving false arrest and imprisonment.

Scheuer and *Krause,* we believe the present case warrants review by this Court.

II

The decision of the court below on the damages issue also merits review by this Court. That decision is squarely in conflict with the decision of the Ninth Circuit in *Donovan* v. *Reinbold,* 433 F.2d 738 (9th Cir. 1970), and is also inconsistent with the polices expressed by this Court in *Bell* v. *Hood,* 327 U.S. 678 (1946) and *Sullivan* v. *Little Hunting Park, Inc.,* 396 U.S. 229 (1969). Moreover, the question of what relief is available in suits under 42 U.S.C. § 1983 is plainly an important one.

In effect, the Court of Appeals held that a college professor who is deprived of his employment in violation of his constitutional rights can recover only his out-of-pocket losses (i.e., lost salary and expenses incurred in finding other employment), and is entitled to no compensation for humiliation, injury to reputation, and deprivation of the right to pursue his chosen profession.[6] In dealing with this precise question in a case involving a lifeguard who was dismissed in retaliation for exercising First Amendment rights, the Ninth Circuit reached exactly the opposite conclusion:

> "Compensatory damages awardable in a Civil Rights Act case are not limited to the out-of-pocket pecuniary loss the complainant suffered. Damages can also be awarded for emotional and mental distress caused by the intentional tort. [citations omitted]. The district court found

[6] The Court of Appeals noted that "Smith applied to 'sixty or seventy' other colleges for employment but never received an offer. He finally obtained employment at the Utah Historical Society, of which he is now the director." (6a). This is not a teaching position.

that Donovan was unusually dedicated to his job and that it meant more to him than simply a means of livelihood. It found that Donovan had tried to find similar employment in the same general area and had been unable to do so. We cannot say that the evidence, including the evidence of Donovan's emotional distress resulting from his loss of employment, was insufficient to sustain the court's finding that Donovan had sustained compensatory damages in the sum of $5,000." *Donovan* v. *Reinbold, supra,* 433 F.2d at 743.

Moreover, this Court, while not defining in detail the elements of damages recoverable for violations of constitutional rights, has emphasized that "federal courts may use any available remedy to make good the wrong done," *Bell* v. *Hood,* 327 U.S. 678, 684 (1946), and that "[t]he existence of a statutory right implies the existence of all necessary and appropriate remedies." *Sullivan* v. *Little Hunting Creek, Inc.,* 396 U.S. 229, 239(1969). The *Sullivan* decision is especially pertinent, since that case, which was remanded for a trial on the issue of damages, involved the wrongful denial of membership in a private swimming club—an act which could hardly cause any direct pecuniary loss, but no doubt did cause inconvenience and humiliation. The clear implication of the Court's decision, therefore, was that such intangible injuries are compensable in a Civil Rights Act case. And the lower courts have frequently allowed damages for injuries of that kind in suits under 42 U.S.C. § 1983. E.g., *McArthur* v. *Pennington,* 253 F.Supp. 420, 431 (E.D. Tenn. 1973) ("physical and mental suffering and humiliation and injury to reputation"); *Antelope* v. *George,* 211 F.Supp. 657, 660 (D. Ida. 1962) ("indignity and humiliation"); *Rhoads* v. *Horvat,* 270 F.Supp. 307, 310 (D. Colo. 1967) ("subjective pain and suffering

and humiliation"); *Solomon* v. *Pennsylanvia R.R.*, 96 F.Supp. 709, 712 (S.D.N.Y. 1951) ("public humiliation which caused her to become upset"); *Sexton* v. *Gibbs*, 327 F.Supp. 134, 143 (N.D. Tex. 1970), *aff'd*, 446 F.2d 904 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062 (1972) ("humiliation, embarrassment and discomfort").

Loss of employment, particularly to a teacher or other professional, obviously means much more than a temporary loss of income. It inevitably causes embarrassment, humiliation, loss of professional reputation, and disruption of career plans. In the present case, petitioner has been forced to abandon his career as a teacher. If a professor who is unconstitutonally deprived of his employment cannot recover damages for these kinds of injuries under 42 U.S.C. § 1983, then the remedy provided by that statute is indeed inadequate. In view of the large number of employment cases which are brought under Section 1983 (see note 4, *supra*) this issue is of sufficent importance to merit review by this Court.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JERRY D. ANKER
LICHTMAN, ABELES & ANKER, P.C.
1730 M Street, N.W.
Washington, D. C. 20036

BRYCE E. ROE
340 East Fourth South
Salt Lake City, Utah 84111

Attorneys for Petitioner